IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.1148 OF 2006

Shri Prakash Mahadeo Korde,
(being legal heir and representative
of deceased Shantabai Mahadeo Korde).. Petitioner
(Orig.Plaintiff)

Vs

1. Smt Sushila Digambar Deshpande,
since deceased through his LRs
Nos 3 to 5,

2. Shri Madhusudan Digambar Deshpande
since deceased through his LRs
Nos 3,4 & 5.

3. Shri Dilip Digambar Deshpande,

4. Shri Anand Digambar Deshpande,

5. Sou.Nirmala Raigopal Rao,

6. Kesu Yesu Tapkir,
since deceased deleted.

7. Shri Kishor Govind Pate,
constituted Power of Attorney
holder of R.Nos 3,4 and 5. .. Respondents.
(Orig.Defendants.)

Mr V.A.Thorat, senior counsel i/b Mr M.S.Lagu, for the petitioner.

Mr P.K.Dhakephalkar with Mr J.S.Deo, for respondent nos 3,4,5 & 7.

CORAM : D.B.BHOSALE,J.
DATE : 23.08.2006

PC:

1. Heard Mr Thorat, learned senior counsel for the petitioner and Mr Dhakephalkar, learned senior counsel for the respondents.

2. This petition is directed against the order dated 7th January,2006, by which Misc.Application No.733 of 2004 filed by the petitioner seeking condonation of delay and for setting aside the abatement, came to be rejected. It appears from the observations in paragraph 8 of the judgment that the said Misc.Application came to be rejected mainly on the ground that the two applications filed by the petitioner (Exhuibits 10 and 11) for similar prayers, were rejected on 21.8.2004 and, therefore, the petitioner could not file the fresh application (Misc.Application No.733/2004). I perused the order dated 21.8.2004 passed by the trial Court, which reads thus :

> "The plaintiff is reported as a dead on 3.6.1998 under the production of document below Exhibit-8. Thereafter, the heir of the deceased plaintiff made his application for setting aside abatement order vide Exh.10 and delay condonation application at Exhibit-11. After transfer of this file to this Court, the learned counsel for defendant Shri Deo insisted for the order on Exh.10 and 11. After having noticed the constant absency of the applicant, i.e.t he L.R. of original deceased plaintiff the application at Exhs 10 and 11 respectively came to be filed and rejected, since the original plaintiff has died on 3.6.1998 and her legal heirs have not been brought on record within the prescribed period of 90 days on record. Hence, the suit stands abated.
> No order as to costs."

The learned senior counsel for the parties are ad idem that the District Court, while disposing of Misc. Civil Appeal No.202 of 2004, had directed the parties to appear before the trial Court on 30.8.2004 and that was the reason why the order dated 21.8.2004 came to be passed by the trial Court in the absence of the petitioner. Moreover, according to Mr Thorat, no order, as mentioned in the order dated 21.8.2004, was ever passed on the applications at Exhibits 10 and 11. It is thus clear that though the parties were supposed to appear before the trial Court on 30.8.2004, the trial Court passed the order on 21.8.2004 and that was the reason why the petitioner was absent before the Court. Similarly, the statement of Mr Thorat in respect of the order referred to in the order dated 21.8.2004 on the applications at Exhibits 10 and 11, has not been disputed by Mr Dhakephalkar, the learned senior counsel for the respondents. In the circumstances, I am satisfied that the following order shall meet the ends of justice.

(i) The order dated 21.8.2004 passed on the applications is set aside. Similarly, the orders, if any passed on the applications at Exhibits 10 and 11, also stand quashed and set aside. The learned Civil Judge shall

decide the applications at Exhibits 10 and 11 afresh after giving an opportunity of being heard to the parties, on merits in accordance with law as expeditiously as possible and preferably within a period of 12 weeks from today. In view of this order, the order dated 7.1.2006 on Misc. Application No.733 of 2004 also stands quashed and set aside. The writ petition is accordingly disposed of.

. Office is directed to send the record forthwith to the trial Court.

(D.B.BHOSALE,J.)